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Supreme Court of the United States

October Term, 1958

No. 662

CALIFORNIA TANKER COMPANY,
Petitioner,

against

ALBERT REARDON,
Respondent.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY RUDERMAN,
Attorney for Respondent,

STANDARD, WEISBERG, HAROLDS & MALAMENT,
Of Counsel.

LOUIS R. HAROLDS,
Of Counsel and on the Brief

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Question Presented

The question here is whether, in a seaman's action for damages under the Jones Act, a steamship company should be permitted to elicit, in the presence of the jury, evidence to show that it has previously paid maintenance benefits to a seaman under a collective bargaining agreement, when the seaman does not claim maintenance (board and lodging) as an element of his damage suit.

Statement

At page 5, petitioner states that following the first opinion rendered by the Court of Appeals on April 7, 1958 (Judge Medina dissenting), a petition for rehearing *in banc* was filed "not only by the counsel who had previously represented him in this action but also by several other attorneys prominent in New York maritime

personal injury litigation for plaintiffs. The petition for rehearing did not urge Judge Medina's views . . ."

"On November 6, 1958 the Court of Appeals vacated its own prior decision and affirmed the judgment of the District Court. A *per curiam* opinion adopted the views expressed by Judge Medina in his dissenting opinion. The *per curiam* opinion explicitly rejected the arguments on which the rehearing had been sought."

It is true that the original majority decision of April 7, 1958, was deemed so patently erroneous and prejudicial to seamen's personal injury actions, that several attorneys volunteered their services to assist in presenting a petition for rehearing to the Court of Appeals *in banc*, without fee. However, the statement that the attorneys did not urge Judge Medina's views, is untrue, for in pointing out the error of the majority opinion, the petition for rehearing *in banc* stated at page 2: "Judge Medina wrote a dissenting opinion, pointing out that there had clearly been no duplication."

Similarly, under the "Conclusion", set forth at page 9 of the petition for rehearing, the seaman's attorneys alleged: "The majority decision enunciates a new rule which appears to be at odds with a satisfactory practice which had previously been commonly accepted and followed. The abandonment of this practice would not only tend to create confusion and prejudice in trials involving seamen, the 'wards of admiralty' but what is worse, it would be based on an erroneous concept of the law, as hitherto understood, and as pointed out by Judge Medina in his dissenting opinion."

Similarly, in the reply brief submitted on behalf of the seaman in connection with that petition, his attorneys stated under their "Conclusion" at page 18 of that brief (which was typewritten with permission of the Court of

Appeals): "The majority opinion of this Court, as decided on April 7, 1958, it is respectfully submitted, should be withdrawn, and the dissenting opinion of Judge Medina should be adopted as enunciating the rule of law applicable to this case."

Petitioner's statement that the *per curiam* opinion of November 6, 1958 "explicitly" rejected the argument on which the rehearing had been sought, is also not true; for that opinion stated not only that a majority of the judges in active service had voted "for a determination *in banc* of the plaintiff's petition for a rehearing," but also stated: "A majority of the judges participating concur in the views expressed by Judge Medina in his dissenting opinion. Accordingly the previous judgment of reversal is withdrawn, and the judgment below is affirmed."

Judge Medina's dissenting opinion, in criticizing the majority ruling of April 7, 1958, had stated (see p. 10 of petitioner's appendix): "The step now taken by my brothers can only lead to delayed payments, confusion and uncertainty in a phase of the law of seamen's rights that should be as simple and clear as possible."

Following this thought, the attorneys representing the seaman here had likewise stated at page 6 of their petition for rehearing *in banc*: "The remedy of providing maintenance is intended to be a simple and effective benefit available to the seaman during his time of need, i.e., while obtaining outpatient care or convalescence. It would indeed be strange if a provision intended to benefit seamen were now to be subverted, so that it would become a means for confusing and prejudicing juries in personal injury suits for damages based on negligence and of unseaworthiness."

It should, therefore, be quite clear that the attorneys who prepared the petition for rehearing *in banc* did not in any way repudiate Judge Medina's dissenting opinion, but, on the contrary, they relied upon it heavily, and urged

the Court, on reconsideration, to adopt it, as was ultimately done. The conclusions which petitioner would have this Honorable Court draw from its allegations in that regard, are completely without foundation.

In discussing the harmful effects which might have ensued, had not the majority opinion of April 7, 1958 been withdrawn, attention was also called by the seaman's attorneys to the practice prevailing in the various circuits, concerning the manner in which seamen's cases are handled, when a claim is made at the trial for damages, in addition to maintenance. (See *McCarthy* v. *American Eastern Corp.*, 175 F. (2d) 727, 728 (C. A. 3d, 1949); *Mullen* v. *FitzSimons & Connell Dredge & Dock Co.*, 191 F. (2d) 82, 85 (C. A. 7th, 1951), cert. den. 72 Sup. Ct. 173; *Weiss* v. *Central Railroad Company of New Jersey*, 235 F. (2d) 309 (C. A. 2d 1956), Note 1; *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, 234 F. (2d) 253 (C. A. 2d 1956)). The *per curiam opinion in banc* correctly pointed out that actually there was no issue before the Court concerning the validity of that practice, because in the case at bar, no claim had been made at the trial by the injured seaman for maintenance, this having already been paid. However, by dicta, in passing, the Court of Appeals impliedly approved of the practice whereby the damage causes of action are submitted to the jury, while the maintenance cause of action is reserved to the judge, for it stated: "We may add, however, that we see no reason to depart from our previous rulings in effect holding the form of trial in the discretion of the trial court so long as care is taken to see that double compensation is not allowed," particularly calling attention to its Note 1 in *Weiss* v. *Central Railroad Company of New Jersey, supra.*

Circuit Judge Waterman's concurring opinion in the case at bar simply expressed the opinion that no view should be expressed "of the varied ways that district judges presently handle claims for maintenance and cure when such

coupled in the same libel with Jones Act claims, no coupling here."

e gone into some detail in quoting expressly etition for reargument *in banc*, from Judge Meenting opinion of April 7, 1958, and from the and concurring opinions of November 6, 1958, se we wish to clarify any misconceptions which rwise arise from certain unfortunate statements n the petition of the steamship company herein.

REASONS FOR DENYING WRIT

s is not a case in which a seaman's suit for has been coupled with a cause of action for nce; nor is it one in which a seaman seeks nable value of board and lodging as an eleis damage suit.

ner has not cited a single case in which a steamny was permitted to introduce evidence at a trial ance paid, where the injured seaman sought only expressly making no claim for room and board.

was good reason why the issue relating to maind was not permitted to be elicited here in the f the jury. Such proof may well have introfusing element in issues which would otherwise ite simple. Thus, in *Plough* v. *Baltimore & Ohio* 64 F. (2d) 254 (C. A. 2d, 1947), cert. den. 333 68 Sup. Ct. 740, it was held that it would be l error to permit a defendant in a personal into show that the plaintiff has received, or might erkmen's Compensation benefits. Eliciting such ld entitle the plaintiff to a new trial, for it raises which is not only prejudicial, but which is also s to the issue of damages. See, also, *Norton* v. *et al.*, 282 App. Div. 744, 122 N. Y. Supp. (2d) Dept., 1953).

This Honorable Court has traditionally distinguished between damages on the one hand and maintenance on the other. (See *Pacific S.S. Co.* v. *Peterson*, 278 U. S. 130, 49 Sup. Ct. 75 (1928); *McAllister* v. *Magnolia Petroleum Co.*, 321 U. S. 96; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 63 Sup. Ct. 246 (1942), Note 2; Volume 2, "The Law of Seamen", Norris, pp. 160, 161).

The cases cited by petitioner are not in point, for they fall into the following categories:

1. Cases not involving seamen and, therefore, having nothing to do with an attempted set-off of maintenance.

Auten v. *U. S. National Bank*, 174 U. S. 125, 19 Sup. Ct. 628 (1899);

Bisso v. *Inland Waterways Corp.*, 349 U. S. 85, 36 Sup. Ct. 135 (1915);

Chicago & Alton R. Co. v. *Wagner*, 239 U. S. 452, 36 Sup. Ct. 135 (1915);

Crane v. *Delaware, L. & W. R. Co.*, 1 F. (2d) 865 (C. C. A. 3d, 1924);

Insurance Co. v. *Baring*, 87 U. S. 159 (1874);

Kansas City Southern Ry. Co. v. *Carl*, 227 U. S. 639, 33 Sup. Ct. 391 (1913);

Philadelphia, B. & W. R. R. Co. v. *Schubert*, 224 U. S. 603, 32 Sup. Ct. 589 (1912);

Southwestern Brewery Co. v. *Schmidt*, 226 U. S. 162, 33 Sup. Ct. 68 (1912);

Sweeney v. *Erving*, 228 U. S. 233, 33 Sup. Ct. 416 (1913);

United States v. *Atlantic Mutual Insurance Co.*, 343 U. S. 236, 72 Sup. Ct. 666 (1952);

United States v. *Brooks*, 176 F. (2d) 482 (C. A. 4th, 1949);

2. Cases involving seamen who were seeking damages at the trial, plus a count for maintenance.

Jenkins v. *Roderick*, 156 F. Supp. 299 (D. C. Mass., 1957);

Johnson v. *United States*, 333 U. S. 46, 68 Sup. Ct. 391 (1948);
Muise v. *Abbott*, 160 F. (2d) 590 (C. A. 1st, 1947);
Smith v. *Lykes Bros. S.S. Co.*, 105 F. (2d) 604 (C. A. 5th, 1939).

3. Cases in which the seaman sought an award for lost room and board at the trial as an element of the damage action itself.

Gomes v. *Eastern Gas Associates*, 132 F. Supp. 29 (D. C. Mass., 1955);
Guay v. *American President Lines* [illegible] Cal App. (2d) 495 (1st Dist.), 1949 A. M. C. 1890 (D. C. Calif. 1st D. C. of Appeals, 1949).

4. A seaman's case based on a decision on a preliminary motion in advance of trial, before the trial issues had crystallized.

Royle v. *Standard Fruit & Steamship Co.*, 184 Misc. 348, 50 N. Y. Supp. (2d) 3[illegible] (1944); 52 N. Y. Supp. (2d) 407; 269 App. Div. 762 (2nd Dept., 1945), 54 N. Y. Supp. (2d) 778.

II. There is no inconsistency whatsoever between the decision herein and Section 5 of the F. E. L. A.

On this point, Judge Medina's dissenting opinion, which was ultimately adopted by the Court *in banc*, stated as follows:

> "Similarly, Section 5 of the FELA does not entitle the appellant to set off any portion of the amount paid for maintenance and cure against the verdict recovered below because the jury was specifically instructed not to include an amount for board and lodging in its verdict. In other words, Section 5 prohibits double recovery just as does the case law on this subject and the appellee in the case at bar has not received such excessive compensation."

Section 5 of the F.E.L.A. provides that a common carrier may set off any sum it has contributed or paid "to any insurance, relief benefit, or indemnity that may have been paid to the injured employee * * * on account of the injury * * * for which said action was brought." The suit at bar here was not brought to recover maintenance. It was brought to recover damages. The steamship company herein did not seek to set off payments for "insurance, relief benefit, or indemnity" to the injured man; it sought to set off maintenance payments. Therefore, the statute has no possible applicability. Further, this section was adopted for cases involving railroad workers, who do not have the remedy of "maintenance and cure" regardless of fault, although they have a somewhat related benefit under the Railroad Retirement Act.

In *McCarthy* v. *Palmer*, 113 F. (2d) 721, 723 (C. A. 2d, 1940), a railroad sought a reduction in a judgment in an F.E.L.A. case, by seeking to introduce evidence concerning the amount of benefits the injured worker would be receiving under the Railroad Retirement Act or, in the alternative, it sought to show the extent of its contribution to that fund. This Court held that this was not a proper item for off-set, as it did not come within Section 5 of the F.E.L.A.

In *Hetrick* v. *Reading Co.*, 39 F. Supp. 22 (D. C., N. J., 1941), the defendant, in an F.E.L.A. case claimed the right to deduct benefits paid under the Railroad Retirement Act, or contributions to its fund, in reliance upon Section 5. In striking out this defense, the Court, at page 25, pointed out that there was a distinction between (a) eligibility for damages under the F.E.L.A., which depended upon a finding of fault on the part of the employer; and (b) eligibility for benefits under the Railroad Retirement Act, which does not depend on fault, stating:

> "We are of the view that there never was a legislative intent that a jury giving consideration to the last named elements (damages) was to draw into its

calculations the annuities provided for by the Retirement Act so that payments made by the employer under the latter legislation would be returned to it."

In *Chicago Great Western Ry. Co.* v. *Peeler*, 140 F. (2d) 865, 868 (C. A. 8th, 1944), the defendant, in an F.E.L.A. case, tried to prove that the injured workman received a pension from the Railroad Retirement Board, one-half of which was paid by the railroad. The Court did not reach the merits of that offer of proof, the evidence being excluded in any event, on technical objections. However, the Court recognized that generally "an employer cannot set up in mitigation of damages in a tort action by an injured employee indemnity from a collateral source, such as insurance or compensation or benefits under a Workmen's Compensation Act even where the defendant has contributed to the fund."

Another F.E.L.A. case, which contains an appropriate comment, is *Brabham* v. *Baltimore & Ohio Railroad Co.*, 220 Fed. 35 (C. A. 4th, 1914), at page 38:

> "It is contended by counsel for defendant that, even if the court erred in permitting testimony to be introduced as to the amount of insurance which the mother received, such error would be harmless, in view of the fact that the mother was permitted to testify that the amount of insurance she received was used to pay burial expenses and certain debts. However, a consideration of the evidence impels us to the conclusion that this testimony tended to influence the jury largely in determining the amount which the plaintiff was entitled to recover, and it is but natural that they should have taken this view of the matter.
>
> "To say the least of it, the evidence was incompetent, and presented an issue not germane to the real question involved in this case, and therefore calculated to mislead and confuse the jury, and as such was prejudicial to the rights of the plaintiff."

Not a single case cited by the petitioner under this point has direct bearing on the issues presented herein.

III. There has been no duplication of damages, and the issue raised by petitioner does not actually exist in this case.

Petitioner uses the word "indemnity" loosely and indiscriminately, so that sometimes it seems to refer to damages, while at other times it seems to refer to maintenance. Unfortunately, the distinction between wages (excluding the reasonable value of board and lodging) and maintenance, has not always been kept in mind. As a result confusing and loose language appears not only in the petition, but is occasionally found in some of the decisions.

Everyone agrees that a plaintiff should not be paid twice for the same item; but with even judges at times uncertain of the basic distinction between maintenance and wages, one can well understand that the evidence offered by the steamship company herein would have been confusing to the jury of laymen, and prejudicial to the plaintiff-respondent. The Trial Judge struck the correct note, and followed the customary prevailing practice when he refused to permit the jury to hear evidence as to the amount of maintenance paid, stating "that it would have the natural effect of prejudicing the jury in favor of the defendant. The jury would not be in a position to know the refinements of legal theory which distinguish maintenance and cure from wage claims." (Oral opinion of District Court Judge, appendix 18a-24a.)

Conclusion

The jury here gave the injured seaman a small enough award for his lost wages and pain and suffering. By these appeals, the steamship company has been attempting to make itself a recipient of the maintenance benefits (required by the union contract and the General Maritime Law), by an equivalent deduction from the jury's award.

although the jury was expressly told that it was not to consider the value of board and lodging in arriving at its damage verdict. Had this stratagem succeeded, the steamship company would have become the beneficiary of the contractual obligation to provide maintenance benefits, not the seaman; and at the same time, the injured seaman's damages would have been diminished by the value of the board and lodging. Under such a confusing and unfair concept, no seaman's attorney would have felt that he could have assured his client of a fair trial by jury.

If a seaman contracts for payment of disability benefits, pursuant to a policy issued by a private Insurance Company, for a given consideration (premiums paid), would the steamship company be entitled to bring that fact out before the jury? Obviously not, and yet, in effect, this is what the petitioner seeks to bring about herein.

Petitioner almost succeeded in its attempt to institute an innovation, which would have permitted steamship companies to call to the attention of the jury maintenance payments, required and fixed by collective bargaining agreements, in cases where these were not sought as an element of damages, and when such proof was being introduced to create confusion, and for purely prejudicial reasons. Petitioner herein deserves no encouragement in this attempt. The petition should be denied.

Respectfully submitted,

HARRY RUDERMAN,
Attorney for Respondent,

STANDARD, WEISBERG, HAROLDS & MALAMENT,
Of Counsel.

LOUIS R. HAROLDS,
Of Counsel and
on the Brief